

1 JoAnn Jett Corson
2 Registered Diplomate Reporter
3 Certified Realtime Reporter
4 P. O. Box 8006
5 Missoula, Montana 59807-8006
6 406/829-7123 office
7 joann_corson@mtd.uscourts.gov

8
9 United States Court Reporter
10
11

12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF MONTANA**
14 **MISSOULA DIVISION**

15 RANDALL MENGES,)
16 Plaintiff,) No. CV 20-178-M-DLC
17 vs.)
18) **TRANSCRIPT OF**
19 AUSTIN KNUDSEN, Attorney General) **HEARING ON MOTIONS**
20 of the State of Montana; GARY SEDER,)
21 Bureau Chief of the Montana Crime)
22 Information Bureau; and SARA)
23 MALIKIE, head of the Sexual and)
24 Violent Offenders Program for the)
25 Missoula County Sheriff's Office,)
 each in their official capacities,)
 Defendants.)
)
16

17 **BEFORE THE HONORABLE DANA L. CHRISTENSEN**
18 **UNITED STATES DISTRICT COURT JUDGE**
19 **FOR THE DISTRICT OF MONTANA**

20 Russell Smith United States Courthouse
21 201 East Broadway
22 Missoula, Montana 59802
23 Tuesday, March 30, 2021
24 13:31:46 to 14:44:25

25 Proceedings recorded by machine shorthand
 Transcript produced by computer-assisted transcription

APPEARANCES

For the Plaintiff:

MS. ELIZABETH K. EHRET
Attorney at Law
Suite 104
3800 O'Leary Street
Missoula, Montana 59808

MR. MATTHEW STRUGAR
Attorney at Law
Suite 2910
3435 Wilshire Boulevard
Los Angeles, California 90010

For the Defendant:

MS. HANNAH E. TOKERUD
MR. J. STUART SEGREST
Assistants Attorney General
P.O. Box 201401
Helena, Montana 59620

CONTENTS

13	Proceedings	3
14	Argument by Mr. Strugar	13
15	Argument by Ms. Tokerud	38
16	Rebuttal Argument by Mr. Strugar	50
17	Reporter's Certificate	55

WITNESS

For the Plaintiff:

Mr. Randall Menges	
Direct Examination by Ms. Ehret	5
Cross-Examination by Mr. Segrest	8
Examination by the Court	8
Cross-Examination by Ms. Tokerud	12

1 PROCEEDINGS

2 (Open court.)

3 THE COURT: Good afternoon. Please be seated.

4 Kelsey, would you please call the matter on the
5 Court's calendar this afternoon?

6 THE CLERK: This is the time set for a hearing in
7 CV 20-178-M-DLC, *Randall Menges v. Austin Knudsen, et al.*

8 THE COURT: Counsel, good afternoon.

9 (Counsel respond.)

10 THE COURT: I have a seating chart here. I see
11 Ms. Tokerud and Mr. Segrest for the state.

12 And Ms. -- is it "Ehret"?

13 MS. EHRET: Yes, Your Honor.

14 THE COURT: Mr. Strugar. And help me with the
15 pronunciation: Is it "Menges"? "Menges"?

16 MR. MENGES: "Menges," sir.

17 THE COURT: "Menges." Okay. Thank you.

18 Well, let me just indicate at the outset it is my
19 practice to read everything that is filed in a case, and I
20 have done so in this case. So I have read all of your briefs
21 and attachments and all of the information you provided to me.
22 And as you know, I issued an order on the 24th of last
23 month -- that's Document 32 in the docket -- consolidating the
24 preliminary injunction motion with a trial on the merits based
25 upon my belief that essentially I was dealing here with legal

1 issues and there was no reason to engage in discovery or
2 postpone an ultimate disposition in this case as it relates to
3 the issues that are before me.

4 Does either party anticipate presenting any
5 testimony this afternoon?

6 Ms. Tokerud?

7 MS. TOKERUD: No, Your Honor.

8 MS. EHRET: (Nodded head affirmatively.)

9 THE COURT: Yes.

10 MS. EHRET: Yes, Your Honor. We plan to call
11 Mr. Menges.

12 THE COURT: Okay. All right.

13 Well, let's, let's just sort of summarize where we
14 are. I've got a motion for preliminary injunction, fully
15 briefed -- that's the plaintiff's motion, obviously; a
16 defendant's motion to stay, fully briefed; and defendant's
17 motion to dismiss, fully briefed. I also received an errata
18 as it relates, I believe, to the -- plaintiff's notice of
19 errata as it relates to the motion to dismiss.

20 And so I think probably we'll go ahead, since it is
21 the plaintiff's motion for preliminary injunction, Ms. Ehret,
22 I will start, then, with the plaintiff. And I don't care how
23 you -- if you wish to make argument, if you wish to call
24 Mr. Menges and have him testify to start with, I will leave it
25 entirely up to you.

1 (Discussion off the record at counsel table.)

2 MS. EHRET: Yes, Your Honor. I'd like to call
3 Randall Menges.

4 THE COURT: All right.

5 Mr. Menges, if you would come forward, please, and
6 the clerk will administer an oath.

7 (Oath administered to the witness.)

8 THE COURT: All right, Mr. Menges. If you'd make
9 yourself comfortable in the witness stand.

10 And, Ms. Ehret, perfect. You may remove your mask
11 if you would like to do so.

12 And, Mr. Menges, same to you. You can take your
13 mask off if you'd like to, if you'd like to do so. It's
14 entirely up to you.

15 You may proceed.

16 WHEREUPON,

17 MR. RANDALL MENGES,
18 called for examination by counsel for plaintiff, after having
19 been first duly sworn to testify the truth, the whole truth,
20 and nothing but the truth, testified as follows:

21 DIRECT EXAMINATION

22 BY MS. EHRET:

23 Q Could you please state and spell your name for the
24 record?

25 A Randall Menges. R-a-n-d-a-l-l, M-e-n-g-e-s.

1 Q And where do you live?

2 A Butte, Montana.

3 Q And you're on the sex offender registry?

4 A Yes, ma'am.

5 Q What is the conviction that you're required to register
6 for?

7 A Infamous crime against nature.

8 Q And was that having -- for having sex with another man?

9 A Yes, ma'am.

10 Q And that conviction was in Idaho?

11 A Yes, ma'am.

12 Q In 1994?

13 A Yes.

14 Q Have you been denied housing because you're on the
15 registry?

16 A Yes.

17 Q Where was that?

18 A In Seattle and in Idaho.

19 Q Let's start with Idaho. What kind of housing was that
20 that you were denied?

21 A It was a homeless shelter.

22 Q So you were denied staying at the homeless shelter?

23 A Yes.

24 Q And in Seattle, was that also a homeless shelter?

25 A Yes.

1 Q And then after, after you were denied the staying at the
2 homeless shelter in Seattle, where did you end up living?

3 A On the streets.

4 Q And have you been denied any employment opportunities
5 because of the registry?

6 A Yes.

7 Q Where was that?

8 A Postmates, as well as a horse-hauling business.

9 Q Regarding the horse-hauling business, what was the salary
10 for that job?

11 A About \$100,000 a year.

12 Q And were you told why you were not given the job?

13 A Yes.

14 Q What was that reason?

15 A She stated that it potentially could harm business if
16 clients looked me up, Googled my name.

17 Q And what would they find when they Googled your name?

18 A That I was on the sex offender registry.

19 Q So you were denied that job because you were on the
20 registry?

21 A Yes, ma'am.

22 MS. EHRET: No further questions.

23 THE COURT: All right.

24 Any cross-examination?

25 (Discussion off the record at counsel table.)

1 MR. SEGREST: Just one, Your Honor.

2 THE COURT: Go ahead, Mr. Segrest.

3 CROSS-EXAMINATION

4 BY MR. SEGREST:

5 Q Good afternoon, Mr. Menges.

6 A Good afternoon, sir.

7 Q This is the first we've heard about this horse-hauling
8 business. When did this occur?

9 A Approximately three months ago.

10 Q Okay. Did you tell your attorney about it?

11 A Yes, sir.

12 MR. SEGREST: Okay.

13 So I guess we'd object to that testimony,
14 Your Honor. Not only have we not had a chance to take
15 Mr. Menges's deposition, we haven't even heard about this
16 particular claim.

17 THE COURT: Well, I'm gonna overrule the objection.

18 MR. SEGREST: No further questions, Your Honor.

19 THE COURT: All right.

20 Mr. Menges, while you're on the stand, I'd like to
21 ask you a couple of questions.

22 And, Counsel, you can follow up if my questions
23 trigger any additional questioning on your part.

24 I wanted to establish some facts as it relates to
25 the original conviction.

1 So when was it that you were convicted? Do you
2 remember month and year?

3 THE WITNESS: I believe it was December of 1994.

4 THE COURT: December of 1994. And what was the --
5 and was this something that you -- was this a conviction that
6 you pled guilty to, or was it following a trial?

7 THE WITNESS: There was an *Alford* plea.

8 THE COURT: An *Alford* plea.

9 THE WITNESS: Yeah.

10 THE COURT: So in 1994, you entered an *Alford* plea.
11 And what was the sentence?

12 THE WITNESS: Five years fixed with ten years
13 indeterminate, for a total of 15 years.

14 THE COURT: Five years fixed with ten years
15 indeterminate, for a total of 15 years.

16 Have you fully discharged that sentence?

17 THE WITNESS: Yes, sir.

18 THE COURT: And did you serve the entire five years
19 of the fixed portion of that sentence?

20 THE WITNESS: Yes, sir.

21 THE COURT: Where was that sentence served?

22 THE WITNESS: In Idaho.

23 THE COURT: In a custodial setting?

24 THE WITNESS: I don't understand what you mean by
25 "custodial."

1 THE COURT: Were you in prison?

2 THE WITNESS: Yes, sir.

3 THE COURT: All right. And then when you were
4 discharged, how long were you on supervised release or
5 probation, or whatever they call it in Idaho?

6 THE WITNESS: It took the entire ten years. They
7 made me do the entire 15-year sentence.

8 THE COURT: Okay. So when was it that you actually
9 completed and discharged that sentence?

10 THE WITNESS: I believe, because Idaho takes time
11 away sometimes -- they don't have good time -- I believe it
12 was 2003, if my memory serves correctly.

13 THE COURT: So if I add 15 to 1994, that results --
14 that would indicate the sentence would terminate in 2009, but
15 you believe, because of good time and other things --

16 THE WITNESS: No. I believe it was 2009, then. It
17 took the entire 15 years. I don't know where I got 2003,
18 Your Honor. I'm just trying to remember.

19 THE COURT: Yeah. No, I understand.

20 So it was -- you believe, then, you may have
21 discharged the sentence in 2009 finally.

22 THE WITNESS: Yes, sir. It's a little confusing
23 because at the end of it I wasn't incarcerated, so -- but I
24 believe the total discharge was in 2009, then, because they
25 made me do the entire 15 years.

1 THE COURT: Okay.

2 THE WITNESS: I must have just got out of prison in
3 2003.

4 THE COURT: Well, if the sentence was in 1994 and
5 there was five years fixed, then that portion of the sentence
6 would have ended in 1999.

7 THE WITNESS: Yes, sir. In the State of Idaho, when
8 I went to the parole commission, they gave me a parole date
9 which -- but in Idaho it's not immediate. They set it out for
10 your release. And so they gave me a parole date that I
11 believe was just over two years. And so I had to do two more
12 years until they released me in 2003, which is, you know, when
13 the final release date was.

14 THE COURT: Okay.

15 All right. I don't have any other questions of
16 Mr. Menges.

17 Ms. Ehret, did my questions cause you to want to do
18 any followup?

19 MS. EHRET: No, Your Honor.

20 THE COURT: Ms. Tokerud, Mr. Segrest?

21 (Discussion off the record at counsel table.)

22 MS. TOKERUD: One question, Your Honor.

23 THE COURT: Yes.

24 MS. TOKERUD: Thank you.

25 ///

CROSS-EXAMINATION

2 | BY MS. TOKERUD:

3 Q Good afternoon.

4 A Good afternoon, ma'am.

5 Q Did you challenge your 1994 conviction in Idaho?

6 A There was a postconviction challenge that related later
7 on, but I'm not sure how -- I mean, in the end it was just
8 kind of dismissed. I'm not sure how it all worked out. I
9 don't understand legal stuff very much.

10 MS. TOKERUD: No further questions.

11 THE COURT: Okay.

12 Anything further?

13 MS. EHRET: No, Your Honor.

14 THE COURT: Mr. Menges, you can return to counsel
15 table.

16 THE WITNESS: Thank you, sir.

17 THE COURT: Thank you, sir.

18 Ms. Ehret, any additional witnesses?

19 MS. EHRET: No, Your Honor.

THE COURT: Any witnesses from the state?

21 MS. TOKERUD: No, Your Honor.

THE COURT: Okay.

23 So it looks like now we're to the point where we're
24 going to have some argument. I didn't put either of you on
25 the clock, but I'd like you both to endeavor to confine your

1 argument, if you could, to a total of 45 minutes per side, and
2 hopefully that gives you enough time. Now that's exclusive of
3 any questions that I might ask, and I suspect I'll probably
4 have some questions for you.

5 But, Ms. Ehret, why don't you go ahead. Why don't
6 you proceed first, if you would, please.

7 MR. STRUGAR: Your Honor, I'll be arguing.

8 THE COURT: All right. Mr. Strugar.

9 MR. STRUGAR: Good afternoon, Your Honor. Matthew
10 Strugar for the plaintiff.

11 With the Court's permission, I'd like to reserve ten
12 minutes of my 45 for rebuttal.

13 THE COURT: You may.

14 MR. STRUGAR: Should I keep my own time?

15 THE COURT: Nope. I've got a, I've got a timepiece
16 up here. I'll keep track of it.

17 MR. STRUGAR: Your Honor, as you just heard,
18 Mr. Menges was convicted in 1994 shortly after his 18th
19 birthday of having oral sex with another young man.

20 THE COURT: Mr. Strugar, if you wouldn't mind, could
21 you take your mask off --

22 MR. STRUGAR: Certainly.

23 THE COURT: -- unless you feel uncomfortable up
24 there without a mask.

25 MR. STRUGAR: No, that's fine.

1 THE COURT: All right. Thank you.

2 MR. STRUGAR: He was convicted under an Idaho law
3 that criminalized all oral and anal sex. In 1994, such
4 prosecutions and convictions were legal. Idaho's law was
5 indistinguishable from the Georgia sodomy law, upheld on a
6 facial challenge by the Supreme Court in 1986 in *Bowers v.*
7 *Hardwick*.

8 Because he was convicted of having oral sex with
9 another man in 1994, Montana requires him to register as a sex
10 offender in 2021. No one contests that the law in 1994
11 allowed for prosecutions for gay sex or that such prosecutions
12 happened. The only thing in dispute is how to deal with those
13 prosecutions today, and that is because in 2003 the Supreme
14 Court in *Lawrence v. Texas* overruled *Bowers*.

15 And that's the heart of the question of the
16 substantive due process claim, Your Honor: What did *Lawrence*
17 do? Did sodomy-only statutes, the 13 that were remaining at
18 the time, did they survive *Lawrence*? And, if they did, what
19 effect does *Lawrence* have on those pre-*Lawrence* convictions?

20 Our position is that *Lawrence* invalidated those
21 13 still-existing sodomy laws. As I understand the state's
22 position, it's that *Lawrence* inval- -- sorry. It's that
23 *Lawrence* was an as-applied ruling to those two defendants or
24 that *Lawrence* rewrote those still-existing sodomy laws to
25 include other elements. Our position is supported by the text

1 of *Lawrence* itself, by subsequent Supreme Court precedent, and
2 by the Fourth Circuit's opinion in the *Macdonald v. Moose*
3 case.

4 In *Lawrence*, eight references by the majority to
5 what they're doing as -- or, sorry, to the question at issue
6 as to whether or not the statute was, quote, valid, indicating
7 they were assessing it for facial validity. There are many
8 references throughout the majority opinion to "laws," plural,
9 indicating they were doing more than just assessing the Texas
10 law. And they overturned *Bowers*. *Bowers* was a facial
11 challenge to Georgia's sodomy-only statute.

12 And they did so on substantive due process grounds
13 and not equal protection grounds because, as the majority
14 said, some might question whether a prohibition would be valid
15 if drawn differently, say, to prohibit conduct between
16 same-sex and different-sex participants; here, the Court again
17 expressing that what they're doing is beyond simply the Texas
18 statute, that it's a broad ruling.

19 Justice O'Connor in her concurrence twice states
20 that she joins the majority in declaring the Texas statute
21 unconstitutional. The Fourth Circuit found that that's
22 exactly what happened in that Virginia sodomy-only statute
23 law, which was indistinguishable from Idaho's,
24 indistinguishable from Georgia's, and mostly indistinguishable
25 from Texas's -- I say "mostly" because Texas was limited to

1 same-sex sex activity whereas the other ones outlawed all oral
2 and anal sex. The Fourth Circuit found that *Lawrence*
3 invalidated Virginia's sodomy-only statute.

4 And in *Obergefell*, the same-sex marriage cases, in
5 describing what *Lawrence* did, the Supreme Court stated, quote,
6 "Lawrence invalidated laws that made same-sex intimacy a
7 criminal act." In this 11-word sentence, the Court uses
8 "invalidated" to show that they're doing facial relief, a
9 broad ruling, and they use "laws" plural to show that it was
10 more than just Texas's law at issue. Even Chief Justice
11 Roberts' dissent in *Obergefell* talks about invalidating facial
12 relief "laws" plural.

13 And honestly, Your Honor, that should be
14 game-set-match for this dispute. Nobody knows what the
15 Supreme Court did in *Lawrence* better than the Supreme Court
16 itself, and *Obergefell* talks about it invalidating laws like
17 Idaho's, like Virginia's, like Georgia's, like Texas's.

18 And so it's as simple as that. If the sodomy-only
19 statute in Idaho is invalid, Menges can't be forced to
20 register. *Danforth v. Minnesota*, Supreme Court, said that if
21 a statute is unconstitutional, quote, "then so is enforcement
22 of all identical statutes in other States, whether occurring
23 before or after our decision."

24 But ultimately, to grant Mr. Menges relief today,
25 the Court doesn't even have to wade into what *Lawrence* did

1 moving forward or if *Lawrence* added, you know, words to
2 Idaho's statute or additional elements because Mr. Menges was
3 convicted before *Lawrence*. He never had a chance to argue
4 that his conduct was within the supposed rewriting of *Lawrence*
5 or that it was unconstitutional to convict him because of, you
6 know, what *Lawrence* did to the sodomy statute. No one in 1994
7 was, because *Lawrence* hadn't come down yet. All the state
8 needed to prove was that he had oral sex, and that's all he
9 pleaded to, and that's the only reason Montana forces him to
10 register today.

11 Our privacy claims essentially are the same except
12 instead of *Lawrence* we rely on the *Gryczan* out of the Montana
13 Supreme Court. We can see the Montana Supreme Court talks
14 about a right to consenting adults, and Mr. Menges, when he
15 was 18, had oral sex with a 16-year-old, but the age of
16 consent in Montana generally is 16. There's no indication
17 that *Gryczan* intended to set up a sort of bifurcated system
18 whereby heterosexual vaginal/penile sex was provided a
19 16-year-old age of consent, whereas oral and anal sex required
20 the participants to be 18.

21 And then we have an equal protection claim that
22 really has nothing to do --

23 THE COURT: Before you get to the equal protection
24 claim, Mr. Strugar, the reason why I asked Mr. Menges
25 questions about the timing of the events surrounding his

1 conviction, including when he was incarcerated and any term of
2 probation or supervised release that followed that
3 incarceration, as you might suspect, is I was wondering
4 whether he had completely discharged his sentence prior to the
5 issuance of *Lawrence* in June of 2003.

6 You have just indicated to me that he was convicted
7 prior to *Lawrence*. Do you know whether or not your client
8 sought habeas relief? Based on what he's saying to me, he was
9 still serving this sentence for five or six years following
10 the issuance of *Lawrence*. Do you know whether or not he
11 sought habeas relief on the basis of *Lawrence*?

12 MR. STRUGAR: I don't believe there's any indication
13 that he did. There was a postconviction relief motion filed,
14 I still think pre-*Lawrence*, in the late '90s, just arguing
15 that I think the sentence was too long.

16 THE COURT: Okay.

17 MR. STRUGAR: I don't quite remember what that
18 petition got to because it got -- it ultimately was dismissed
19 because Mr. Menges was unable to continue to keep paying those
20 attorneys.

21 THE COURT: Okay. All right. So how does, how does
22 the timing impact the argument that the state is making based
23 on *Heck*?

24 MR. STRUGAR: Yeah, I don't think the timing has any
25 effect on the argument that we're talking about in *Heck*.

1 *Heck*, you know, seeks to bar -- at least in the Ninth Circuit,
2 Your Honor, *Heck* looks to what the nature of the relief is,
3 whether it's prospective or retrospective.

4 So if you look at Mr. Heck himself, Mr. Heck was
5 arrested, convicted, still serving a sentence when he files a
6 claim claiming unlawful arrest, a 1983 claim for damages. And
7 the Supreme Court says, of course, that would, saying that he
8 was falsely arrested, would obviously call into question his
9 conviction, call into question his continuing confinement. So
10 they sort of create this abstention, essentially an abstention
11 rule about getting around habeas.

12 There's significant questions today about whether
13 *Heck* even applies to plaintiffs who are out of custody. In
14 *Spencer v. Kemna*, there were five justices, and a combination
15 of concurring and dissenting opinions say that *Heck* doesn't
16 apply to out-of-custody plaintiffs.

17 And then in 2004 and 2005, in *Muhammad v. Close* and
18 *Wilkinson v. Dotson*, the Supreme Court applied the rule as if
19 that was the rule, focusing on whether those plaintiffs had
20 habeas availability at the time they filed their complaint,
21 they filed their 1983 complaint.

22 And there's a circuit split today. There's sort of
23 a small majority -- Second, Fourth, Sixth, Seventh, Tenth, and
24 Eleventh -- that say *Heck* doesn't apply to an out-of-custody
25 plaintiff. There's a small minority -- the First, Third,

1 Fifth, and Eighth -- say that it can.

2 But the Ninth Circuit kind of goes its own way, and
3 it has this rule from *Martin* about whether or not there was --
4 the nature of relief sort of sought is prospective or
5 retrospective. So the plaintiffs in *Martin*, homeless people
6 who had been arrested in Boise for sleeping outside, filed a
7 1983 suit saying they want damages for those arrests and the
8 time they served on them. They want expungement of their
9 criminal convictions, and they want the statute to be enjoined
10 moving forward. And the Ninth Circuit says expungement,
11 declaration that their, you know, original convictions were
12 unlawful, the damages, those are all retrospective relief.
13 But saying the statute is unconstitutional moving forward,
14 that's prospective relief, and *Heck* doesn't get at that.

15 I think maybe an even better decision for us is the
16 Ninth Circuit's opinion in -- I'm probably going to botch the
17 name of this case -- but it's *Huftile v. Miccio-Fonseca*, and
18 it's cited at page 15 of our opposition to the motion to
19 dismiss. And there we have a man who is confined under
20 California Sexually Violent Predators Act. He's in civil
21 commitment, and he says the psychiatrist who evaluated him did
22 so using procedures that were unconstitutional. He asked for
23 damages for that initial confinement. He asked for a
24 declaration that those procedures were unconstitutional; and
25 he asked for an injunction moving forward, saying, "You can't

1 use these procedures against me in the future."

2 So the Ninth Circuit says there's two of those
3 requests for relief that are retrospective, saying that his
4 initial confinement was unconstitutional, damages for that,
5 but saying that those unconstitutional practices can't be
6 enjoined moving forward is prospective in nature. It doesn't
7 sort of question the validity of his original conviction.

8 And that's the situation that Mr. Menges faces; also
9 subject to a civil restraint scheme, obviously less onerous
10 than civil commitment, but he doesn't have -- he's not asking
11 for any relief that would get at what the *Heck* cases call the
12 core of the habeas nature of relief that *Heck* is concerned
13 with. He's not in confinement. He has no access to habeas
14 currently. He's only seeking prospective relief. He's
15 seeking prospective relief because under the law as it exists
16 today, Menges didn't commit a crime.

17 The state's own --

18 THE COURT: Mr. Strugar, let me ask you: Are you
19 familiar with -- it is a Southern District of Mississippi case
20 from 2018, *Doe v. Hood*.

21 MR. STRUGAR: I am. I was counsel in that case,
22 Your Honor.

23 THE COURT: Oh, you were.

24 MR. STRUGAR: I was, yes.

25 THE COURT: All right. In front of Judge Reeves.

1 MR. STRUGAR: Yes, Your Honor.

2 THE COURT: And so what -- tell me what Judge Reeves
3 was thinking and what he was doing in that case when he
4 appears to have remanded that for -- or he did something as it
5 relates to --

6 MR. STRUGAR: Sure.

7 THE COURT: -- to *Heck*.

8 MR. STRUGAR: To *Heck*.

9 THE COURT: Yeah.

10 MR. STRUGAR: There's a lot I could say about *Doe v.*
11 *Hood*. We filed it as a class action that we filed in 2015.
12 There were about 70-something class members. We settled out
13 about half the class, at which point we sort of ruined our own
14 numerosity, and then were proceeding with just one plaintiff
15 who had a conviction from the 1970s.

16 And the Fifth Circuit just has very different *Heck*
17 precedent than the Ninth Circuit does. The Fifth Circuit says
18 if a plaintiff ever had access to *Heck* -- ever had access to
19 habeas relief, that no matter how prospective or retro- -- you
20 know, no matter how prospective the relief is, that *Heck* bars
21 it. It just has a very sort of punitive *Heck* structure that
22 the Ninth Circuit does not employ.

23 So Judge Reeves said, sort of like the situation we
24 have here -- here, the states made some arguments that
25 Mr. Menges could go seek postconviction relief in Idaho.

1 Well, there's a one-year statute of limitations in Idaho, and
2 he was convicted in 1994. Mississippi's, I think, had
3 180 days or something like that. So our argument to Judge
4 Reeves was, "You could send us to state court, but he's
5 decades outside the statute of limitations, so, you know, he's
6 not going to get relief there."

7 And Judge Reeves essentially told us, "Go try,
8 because the Fifth Circuit's *Heck* bar is what it is and it's so
9 punitive. If you don't get it, come back to me and I'll give
10 you what you want."

11 We filed for it, and the state -- smartly, I think,
12 knowing that they were going to get a broader ruling in a 1983
13 ruling that would trigger 1988 fees and whatnot -- just didn't
14 oppose the petition. And despite the fact that it was decades
15 and decades outside of the statute of limitations, they
16 granted the plaintiff's motion for postconviction relief.

17 THE COURT: Relief.

18 MR. STRUGAR: So in that case, you know, we didn't
19 get a final judgment, but we -- I'm sorry; we got a stipulated
20 judgment for the half of the class that we settled out. We
21 never got a final judgment for Mr. Doe in that case.

22 THE COURT: In federal court.

23 MR. STRUGAR: In federal court.

24 THE COURT: But you got habeas relief.

25 MR. STRUGAR: We did.

1 THE COURT: All right. Thank you. I didn't mean to
2 get off on a tangent on *Doe v. Hood*.

3 MR. STRUGAR: Sure.

4 THE COURT: And I didn't realize that you had been
5 counsel in that case.

6 Yes, here it is. I see that now.

7 MR. STRUGAR: I'm familiar with it, Your Honor.

8 THE COURT: Thank you.

9 MR. STRUGAR: That's how I ended up on this case and
10 how I ended up on the Idaho case.

11 THE COURT: Yeah.

12 MR. STRUGAR: One last thing about *Heck*, and this
13 isn't in the briefing but it came to me as I was preparing for
14 this argument. I think even if you accept the state's
15 argument about *Heck*, which we don't believe is right, but even
16 if you were to, it still wouldn't apply to the equal
17 protection claim. The equal protection claim doesn't seek to
18 challenge anything about his conviction. It says just today.
19 You know, his conviction could be completely valid, and the
20 equal protection claim would be still exactly what it is even
21 without *Lawrence*.

22 We're just saying that there's no rational basis to
23 distinguish between a situation whereby someone who is
24 heterosexual and has vaginal sex with a 16-year-old when
25 they're 18 doesn't have to register, while someone who has

1 oral sex when they're 18 with a 16-year-old does. And that
2 really doesn't get at any question about sort of whether the
3 conviction was proper at the time; it just asks whether
4 there's a rational basis for that distinction in the
5 registration scheme.

6 So our position is that *Heck* doesn't bar the
7 substantive due process or the privacy claims. But even if it
8 did, it wouldn't get at the equal protection claim.

9 THE COURT: I know you're going to get into the
10 equal protection claim, but both parties appear to agree that
11 rational-basis review should govern your client's equal
12 protection claim. I'm a little curious as to why you didn't
13 seek to persuade me that strict scrutiny ought to apply here,
14 or maybe intermediate scrutiny.

15 MR. STRUGAR: Sure. I mean, in some sense it is a
16 gender discrimination distinction. There is that recent
17 Title VII --

18 THE COURT: Right.

19 MR. STRUGAR: -- case out of the Supreme Court. I
20 just don't think -- I think we're certainly trending in that
21 direction. I don't think we're there yet. I mean, I don't
22 think the Supreme Court -- and that was more of a statutory
23 interpretation than it was an equal protection clause
24 decision, as I remember it.

25 And to be frank, we've gotten a lot of traction in

1 the gay rights movement in equal -- in, sorry, in
2 rational-basis cases. We have, we have *Romer v. Evans*, we had
3 *Windsor*, and we have -- *Obergefell* was sort of a combination
4 substantive due process/Equal Protection Clause claim. And we
5 just thought we had the facts on rational basis that we didn't
6 need to sort of create new law or recognize new standards
7 here, because I think we win under rational basis, Your Honor.

8 There's a significant line of cases that would
9 support finding that there's no rational basis, starting with
10 the contraception cases of *Eisenstadt* and *Carey* where the
11 Supreme Court said there is no rational basis to allow married
12 couples to have contraception but prevent unmarried couples,
13 or to allow 16-year-olds access to contraception but not
14 15-year-olds, on through what I think is maybe one of the best
15 cases for us on rational basis, the *Limon* case out of the
16 Kansas Supreme Court.

17 They have a situation pretty similar to Mr. Menges:
18 Living in an institutionalized setting. 17-year-old man turns
19 18. Shortly after his 18th birthday, he has sex with another
20 resident. That resident was 14 in Mr. Limon's case.
21 Mr. Limon was sentenced to 17 years and made to register,
22 while as if he was an 18-year-old who had heterosexual sex
23 with a 14-year-old girl, he would have received approximately
24 one year and no registration. He loses at the trial court.
25 He loses at the Kansas intermediate appellate court. He loses

1 at the Kansas Supreme Court. The U.S. Supreme Court grants,
2 holds for the decision in *Lawrence*, remands. Goes back to the
3 Kansas intermediate appellate that again finds that there's a
4 rational basis, until finally the Kansas Supreme Court, after
5 Mr. Limon had served five and a half years of his sentence,
6 said there's just no rational basis to have this distinction
7 between the types of sex acts or the gender of the
8 participants. The state there argued things like promoting
9 procreation or preventing venereal disease, but the Kansas
10 Supreme Court said those just don't hold up.

11 And that leads nicely into *Doe v. Jindal and*
12 *Caldwell*, sort of a predecessor to the *Doe v. Hood* case in
13 Mississippi, some of the same plaintiffs. In that case,
14 Mississippi required people convicted of sort of heterosexual
15 vaginal prostitution to -- I mean, there was no registration
16 requirement for sort of vanilla prostitution, but there was a
17 registration requirement for prostitution involving oral or
18 anal sex. And, again, the states -- Louisiana put forward a
19 lot of the same bases, saying that it supported -- to support
20 the law that Kansas did. And the district court in both of
21 those cases said those just don't hold up and struck it down
22 on rational basis.

23 So those are some of the reasons we didn't sort of
24 try to push for intermediate or strict scrutiny because we
25 think we win even on the easiest standard, Your Honor.

1 THE COURT: My concern about the equal protection
2 claim is that -- and I, one of the other cases that I read was
3 this 2020 case in *State of Idaho v. Gomez-Alas*. And in
4 looking at the two statutes in question in Idaho, it doesn't
5 appear that the statutes in question here draw any distinction
6 regarding sex or age and do not appear to exclusively target
7 homosexual activity, which causes me some concern as it
8 relates to the equal protection argument. Can you address
9 that?

10 MR. STRUGAR: I can. Let me start with, let me
11 start with age.

12 It's not -- our argument is not that the Idaho
13 "crime against nature" statute distinguishes between age.
14 It's that the Idaho registration scheme that Montana adopted
15 in 2005 distinguishes between age.

16 So, for instance, in Montana today, there's a
17 16-year-old age of consent. In Idaho today, there's what's
18 called a Romeo and Juliet statute, whereby to constitute
19 statutory rape there needs to be a sufficient age difference
20 between the minor and the adult. So an 18-year-old -- it has
21 to be more than two years. So an 18-year-old having sex with
22 a 16-year-old does not constitute statutory rape. In Idaho
23 today, an 18-year-old having sex, consensual sex with a
24 15-year-old does. So that's how the Romeo and Juliet statute
25 works. But in 1994, we concede in Idaho any sex between an

1 adult and a minor was considered statutory rape.

2 The equal protection argument comes in because Idaho
3 has carved out a textual statutory exemption in its
4 registration law, saying people who were 18 when they were
5 convicted of statutory rape do not need to register.

6 THE COURT: Okay.

7 MR. STRUGAR: So anyone who is 18 and has sex with a
8 16-year-old under heterosexual vaginal sex escapes
9 registration in Idaho and doesn't carry that registration over
10 to Montana that has wholesaledly adopted that registration
11 scheme. But, you know, anyone who is convicted of crime
12 against nature when they're 18 with a 16-year-old or, frankly,
13 crime against nature with anybody --

14 THE COURT: Right.

15 MR. STRUGAR: -- anyone does.

16 So that's where the equal protection comes in; that
17 somebody in Mr. Menges's situation, if he had had heterosexual
18 sex, would escape registration, whilst he has to register, and
19 there's no rational basis for that.

20 THE COURT: Okay.

21 MR. STRUGAR: As to the question of distinguishing
22 between gender or sex, that's correct. The Idaho statute
23 prohibits all oral and anal sex no matter the sort of gender
24 or sex of the participants, but that's no different than the
25 Georgia statute that the Supreme Court first upheld and then

1 overturned, first in *Bowers* and then in *Lawrence*. The Georgia
2 statute was not, unlike the Texas statute, was not limited to
3 purely homosexual sex acts. It prohibited, like most sodomy
4 statutes, all oral and anal sex wholesale. And, you know, in
5 *Lawrence*, in some pretty stark terms, the Supreme Court said
6 *Bowers* was wrong when it was decided and it's wrong today.

7 So -- and just a few words about the *Gomez-Alas*
8 decision. You know, *Gomez-Alas* was not a facial challenge.
9 It was an as-applied challenge. Mr. Gomez-Alas had the
10 opportunity to argue that sort of -- he had a jury instruction
11 that required the jury to find that it was against the will of
12 the victim, and he lost that at trial.

13 Now I think the Supreme Court did some pretty
14 strange things with "against the will," saying that, you know,
15 it needs to be affirmative consent and all these sort of
16 extratextual sort of outside of Idaho criminal -- all the
17 Idaho criminal law, but sort of how the state uses *Lawrence*
18 convictions -- or uses sodomy convictions moving forward past
19 *Lawrence*, you know, I have my own sort of personal
20 disagreements with Idaho Supreme Court and how that came out,
21 but I don't think it has any effect on what you can do sort of
22 looking backwards.

23 You know, we have a procedural due process claim in
24 the similar Idaho case because the Idaho courts claim when we
25 have somebody with a pre-*Lawrence* conviction, we do an

1 investigation of the police reports and the indictment and all
2 these other things to sort of determine: Would this
3 registrant have been convicted under our new *Lawrence* scheme?
4 So they sort of perform some kind of guesswork and decide
5 whether or not they thought they could have obtained the same
6 conviction or whether that conviction would have, yeah, would
7 have actually been entered under the new *Lawrence* scheme. And
8 we say, well, if you're gonna sort of have a second trial,
9 clients need to be a part of that.

10 Now Montana, in the stipulated facts that we filed
11 yesterday with the Court, Montana says, you know, they don't
12 assert that they sort of do these post hoc investigations.
13 They say, "We rely on the other state's registration
14 requirements wholesale."

15 So, yeah, those are just a few, a few of the
16 distinctions between *Gomez-Alas* sort of post-*Lawrence* and
17 Mr. Menges's conviction nine years before.

18 A few points about standing, and then I'll conclude
19 on the preliminary injunction -- or the permanent injunction
20 motion.

21 The state's attack on Mr. Menges's standing is sort
22 of an attack on both his injury and then an attack on the sort
23 of combination of causation or redressability. As to the
24 injury, the argument was primarily that Mr. Menges did not --
25 does not reside in Montana. As the Court heard earlier,

1 Mr. Menges has relocated to Montana earlier this month.

2 THE COURT: That is a stipulated fact.

3 MR. STRUGAR: It is a stipulated fact.

4 THE COURT: He lives in Butte.

5 MR. STRUGAR: So he's injured now by registration.

6 He has to let the state know most of his, you know, movements:
7 if he leaves the county for more than ten days, if he changes
8 his student status, if he changes his employment. So that
9 itself is an injury.

10 There's all kinds of cases challenging sex offender
11 registry where this sort of injury is never contested. Injury
12 was contested in *Doe v. Jindal* and *Doe v. Caldwell*, and the
13 courts have dispensed with it pretty quickly; of course, if
14 they had lived in the state at the time, but so does
15 Mr. Menges now. Our position is that he was injured by being
16 maintained on the registry even when he was out of state, but
17 I don't think we even need to go there at this point.

18 And then the causation and redressability issues
19 sort of overlap with the motion for the stay arguments, and
20 that's that because Montana's only enforcing Idaho's registry,
21 it's not really Montana's officials who are doing it.

22 THE COURT: Just as an aside, I looked at the docket
23 in the Idaho case, Judge Winmill's case --

24 MR. STRUGAR: Yeah.

25 THE COURT: -- some time ago. What's the status of

1 that case?

2 MR. STRUGAR: Argument on the pending motions to
3 dismiss and the motion for preliminary injunction are a week
4 from tomorrow, Your Honor, so I'm busy.

5 THE COURT: All right. You're spending time in
6 Montana and Idaho.

7 MR. STRUGAR: Montana is still -- or, I apologize.
8 Idaho is still by Zoom, so I'll be back in Los Angeles.

9 THE COURT: All right.

10 MR. STRUGAR: I always appreciate a -- I had my
11 honeymoon in Missoula, so I always appreciate a chance to come
12 up here.

13 As to causation or redressability, you know, the
14 harm to Mr. Menges, Mr. Menges lives here. The law is here.
15 The defendants are here. The state action is here. This is a
16 function of Montana's law carried out by Montana officials.
17 Montana did not have to wholesale adopt Idaho's registration
18 scheme which requires Mr. Menges to register, but they chose
19 to in 2005. They're enforcing it now, and they have to defend
20 it.

21 Finally, you know, I don't think a resolution in the
22 Idaho case will necessarily affect this case for a couple
23 reasons. I think now that Mr. Menges is here, I at least have
24 a potential mootness problem in Idaho. He's still on the
25 registry there, but should they choose to take him off, you

1 know, I'm not sure if his case is moot or not, but it's at
2 least arguable.

3 And the language of the Montana statute that forces
4 him to register, 46-23-502(9)(b), says Menges has to register
5 if he has, quote, a "violation of a law of another state" for
6 which he "was required to register." I don't want to be cute,
7 but that is in the past tense. It sort of does look to, sort
8 of at least temporally, like the time of conviction, was he
9 required to register? And if Idaho -- the relief we seek in
10 Idaho is some pretty broad declaration and injunctive relief,
11 but we don't seek to get rid of his conviction, obviously,
12 because --

13 THE COURT: Yeah. I read your, I read your
14 complaint in the Idaho action.

15 MR. STRUGAR: So, you know, all Idaho will do is
16 enjoin the officials moving forward. He will still, at least
17 textually in the words of the statute, have an injury going --
18 you know, have a registration requirement going forward on at
19 least the text of the law.

20 Now the state, in their briefing, says that they'll
21 respect sort of what the Idaho court does. But I note that on
22 the stipulated facts that we filed, No. 28, it says that if
23 the SVOR, the Sexual or Violent Offender Registry, received
24 information that Mr. Menges is no longer required to register
25 in Idaho or another state, SVOR would forward this information

1 to the Montana attorney general's office for review and would
2 follow the recommendation of the legal department.

3 THE COURT: Yeah. What does that mean?

4 MR. STRUGAR: I don't know. It's certainly not,
5 it's certainly not a commitment that they will follow what the
6 Idaho court does. It says they'll sort of send it to the
7 attorney general and say, "You know, what do you think about
8 this?" So I don't know that it's the case that even all the
9 relief we ask for in Idaho would, would decide this case.

10 And so I guess I'll start -- I'll address the stay
11 motion. Should we argue the motion separately, or am I okay
12 to address the stay motion right now?

13 THE COURT: Argue all of the motions.

14 MR. STRUGAR: Okay. Great.

15 THE COURT: Yeah.

16 MR. STRUGAR: Thank you, Your Honor.

17 You know, as to the stay motion, we're talking --
18 there's three factors. There's the hardship to the state and
19 the hardship to Mr. Menges, but we're already talking a little
20 bit about the "orderly course of justice" issue. And, you
21 know, those arguments are pretty much the same; that the harm
22 is here, and it's Idaho -- or, I'm sorry, it's Montana
23 officials who are carrying it out here in Montana.

24 Both cases do ask the courts to apply similar
25 principles to the same plaintiff -- concede that. But both

1 states are injuring Mr. Menges, and there are different state
2 officials, and different courts have different jurisdictions
3 over different state actors. And then, again, even if he wins
4 his case in Idaho, I'm not sure that it really gets him
5 anything in Montana, although it might.

6 As to the other two factors, Your Honor, hardship to
7 the state, the Ninth Circuit requires a clear showing of
8 hardship to the state before entering any stay. And Ninth
9 Circuit precedent, the *Lockyer* case, says simply defending a
10 case is not a hardship. The state has identified no other
11 hardship.

12 And the hardship to Menges is significant. I mean,
13 he's lived on the registry for a long time, but that doesn't
14 mean it's not a significant harm. Every day that goes by is
15 another harm that he is potentially kicked out of a shelter or
16 denied employment. He has to notify the state of all of his
17 movements and provide them DNA samples. And at least in some
18 counties in Missoula, he has to pay for the pleasure of doing
19 so. So there is, you know, an ongoing hardship to Mr. Menges.

20 THE COURT: Well, and if he fails to register --

21 MR. STRUGAR: It's a felony.

22 THE COURT: -- he's subject to five years in prison
23 and a \$10,000 fine.

24 MR. STRUGAR: Absolutely, Your Honor.

25 Finally, if I could just -- you know, I think we're

1 already sort of talking about it, but I want to talk about the
2 balance of the hardships that's required for a permanent
3 injunction just to sort of outline some of the hardship to
4 Mr. Menges. But briefly I'd like to talk about some of the
5 hardships that the state identifies and why I don't think that
6 they're significant.

7 The state identifies these five interests that are
8 served by Montana sex offender registration generally. I note
9 that they only talk about the sex offender registry generally
10 and not sort of the hardship of taking Mr. Menges himself
11 individually off.

12 But the first interest they identify is the danger
13 of recidivism. Mr. Menges didn't commit a crime under the law
14 today. You can't be a recidivist if it's not a crime.

15 Impairment of law enforcement's efforts from lack of
16 information, again, there's no law enforcement interest in
17 preventing people from having oral sex.

18 Preventing victimization in resolving sex offenses,
19 again, no crime, no victim, no sex offense today under the
20 law.

21 And a reduced risk of privacy because of public
22 safety, we believe *Lawrence* and *Gryczan* shows there's no
23 public safety issues here as to Mr. Menges generally or as to
24 sodomy-only statutes.

25 And, finally, the protection of vulnerable groups in

1 the public and in general, just gay people aren't a risk to
2 the public. They might have been thought so in 1994 but
3 they're not today, Your Honor.

4 So unless the Court has any further questions, I'd
5 like to reserve my remaining time for rebuttal.

6 THE COURT: You are almost exactly at 35 minutes.

7 MR. STRUGAR: Wonderful.

8 THE COURT: So you will have ten minutes for
9 rebuttal.

10 MR. STRUGAR: Thank you, Your Honor.

11 THE COURT: Thank you.

12 Ms. Tokerud.

13 MS. TOKERUD: Good afternoon, Your Honor.

14 THE COURT: Good afternoon.

15 MS. TOKERUD: At issue is a Montana law requiring
16 registration for those already required to register as a sex
17 offender in another state. When someone crosses state lines
18 and comes to Montana, we require registration if another state
19 does. It's immaterial where or when the conviction occurred
20 as long as the state imposed a registration obligation on the
21 offender.

22 I'd like to address some of the points made by
23 counsel based on your questioning.

24 Montana does not adopt wholesale the Idaho scheme.
25 Instead, we give comity to Idaho's registration requirement,

1 essentially giving that decision full faith and credit in
2 Montana.

3 As to the discussion of the statutory language with
4 the "was required," it is the state's legal interpretation of
5 the statute that if the plaintiff were not required to
6 register in Idaho, he would not have a conviction requiring
7 registration under Montana law. To read the language as "was
8 required" as covering any offense for which someone was ever
9 required to register would include, for example, convictions
10 that have been expunged. So in our position that doesn't make
11 sense as a reading.

12 And as to the stipulated facts that go through the
13 process that would occur should Idaho make a decision on the
14 constitutionality of the law under which the plaintiff was
15 convicted, we're not sure what Idaho will or won't do or what
16 that process would look like, but the stipulated facts set
17 forth the process that Montana follows when something like
18 that happens.

19 THE COURT: So let's, let's, since you're talking
20 about it, let's look at paragraph 28 of the stipulated facts.
21 And that, that stipulated fact indicates that if Montana
22 received information that Menges is no longer required to
23 register in Idaho or another state, Montana would forward this
24 information to the Montana attorney general's office for
25 review and would follow the recommendation of the legal

1 department.

2 What does that mean, and what is contemplated by
3 that? I mean, what's the Montana attorney general going to
4 review if Idaho, if the Idaho court determines that he's no
5 longer required to register in Idaho? If he doesn't have to
6 register in Idaho, he doesn't have to register here, does he?

7 MS. TOKERUD: That is our position, Your Honor, yes.

8 THE COURT: Yeah. So what is there to review?

9 MS. TOKERUD: My understanding from the SVOR is that
10 when something like this comes up -- this is quite unusual --
11 so they would want to forward along the Idaho decision, for
12 example, to the legal department to get guidance.

13 THE COURT: Okay. All right.

14 MS. TOKERUD: Going back to the intent behind the
15 law that is to protect the public, no matter what jurisdiction
16 decided that sex offender status was warranted, the Montana
17 statutory scheme maintains the responsibilities of
18 registration across state lines to be fulfilled where the
19 offender has moved.

20 Here, the plaintiff is bringing an as-applied
21 challenge. He's conceded that Montana's law is, on its face,
22 constitutional. We believe that the as-applied challenge
23 fails because the reasons for the initial registration in
24 Montana are not relevant to whether he has to then register in
25 Montana. It was the Idaho court that determined that

1 registration was appropriate, and the reason that the
2 plaintiff is required to register in Montana is the fact that
3 Idaho requires registration as covered in the stipulated
4 facts.

5 The plaintiff says that he's not challenging his
6 conviction in this court, but every claim asks the Court to do
7 that. Either he is challenging the underlying conviction,
8 which is barred by *Heck*, or he isn't, and Montana's law is
9 constitutional on its face because it relies on giving comity
10 to other states' decisions regardless of the underlying
11 conviction.

12 Here, the plaintiff --

13 THE COURT: I'm having trouble with your argument
14 that he is, in fact, challenging the underlying conviction. I
15 don't see where he's doing that in this case. He's asserting
16 a due process, equal protection, Montana constitutional
17 challenge to the registration statute here in Montana.

18 So I'm really struggling with that argument, and, I
19 mean, I don't know how many times Mr. Menges has to say it
20 through his attorneys. He's not challenging the underlying
21 conviction. He's discharged that conviction, in fact. So
22 why, why do you think he's challenging the underlying
23 conviction?

24 MS. TOKERUD: When you look at the arguments
25 regarding the claims, they all rely on whether this behavior

1 was, in fact, protected conduct, whether it was consensual.
2 He's looking back at the facts that underlie that conviction,
3 and the registration requirement is a collateral consequence
4 of that underlying conviction.

5 THE COURT: Okay. I'm still not convinced, but
6 that's all right. I understand your argument.

7 MS. TOKERUD: Thank you, Your Honor.

8 Here, the plaintiff is seeking a permanent
9 injunction. He must show actual success at this point in the
10 proceedings, not just a likelihood of success.

11 Under Montana law as applied by the Ninth Circuit,
12 the plaintiff must prove the constitutional challenge beyond a
13 reasonable doubt, and laws are presumed to be constitutional.
14 Moreover, courts decide avoiding -- avoid deciding
15 constitutional questions if the case may be disposed of on
16 other bases, and here we have, for example, the pending motion
17 to dismiss as well as the motion to stay.

18 As the Court has already discussed, the appropriate
19 level of scrutiny to apply to Montana's law is rational basis.
20 The Ninth Circuit has said that somebody doesn't have a right
21 to be free of registration requirements as a fundamental
22 right, and we believe Montana's law survives rational basis
23 because it's based on legitimate and substantial interests.

24 The plaintiff's claims are procedurally barred, as
25 we've argued in briefing. We believe the plaintiff lacks

1 standing. To the extent that the plaintiff is seeking a
2 permanent injunction applied to all of those with a
3 pre-*Lawrence* conviction, he lacks standing. He cannot raise a
4 claim on behalf of any person other than himself. This is not
5 a class action.

6 And then as argued in the briefing, we believe that
7 his claims are barred by the *Heck* doctrine.

8 THE COURT: Let's talk a little bit about *Heck*. It
9 seems to me -- and I'm focusing primarily on *Wilkinson v.*
10 *Dotson* -- that *Heck* really only applies to the context in
11 which in-custody prisoners circumvent the habeas process. And
12 we know that Mr. Menges is not in custody, so why would *Heck*
13 apply at all?

14 MS. TOKERUD: Your Honor, our position is that it
15 applies to any claim trying to get, like we discussed before,
16 to the underlying validity of the conviction.

17 THE COURT: So your *Heck* argument is dependent upon
18 me concluding that he is, in fact, sort of mounting a
19 collateral attack on the underlying conviction in this case.

20 MS. TOKERUD: Yes. And counsel discussed the *Martin*
21 case with you earlier, and, there, the relief sought was to be
22 free of future prosecution. Here, that's not the case. He's
23 seeking relief from a collateral consequence of the
24 conviction, which is the registration requirements. And
25 similar to the *Doe v. Hood* that was discussed, the state

1 thinks that he should try other avenues of relief first.

2 THE COURT: It seems -- and I'm still, I'm still
3 focusing here on *Heck*. It seems to me that Montana, the state
4 of Montana is arguing for a broad expansion of *Heck* beyond the
5 specific context, a currently in-custody prisoner seeking
6 present or future relief. I gather you disagree with that.

7 MS. TOKERUD: Well, we certainly understand that he
8 is not in custody.

9 THE COURT: Right. And if, if I'm of the opinion
10 that *Heck* really only applies in the context to in-custody
11 prisoners, wouldn't this argument of yours, of the state's, be
12 an expansion of that?

13 MS. TOKERUD: If that's your understanding, yes.

14 THE COURT: So why -- tell me again: Why is my
15 understanding incorrect?

16 MS. TOKERUD: Because we read *Heck*, including how it
17 was applied in the *Martin* case, to apply to equitable relief
18 concerning existing confinement and to -- excuse me, not to
19 instances seeking future relief; whereas, here, instead of
20 seeking relief from future prosecution, he is seeking relief
21 from something that goes to the validity of his confinement
22 and his underlying conviction.

23 THE COURT: Okay. All right. I've got it. I
24 understand your argument.

25 MS. TOKERUD: Okay.

1 THE COURT: Okay. So are you still contending that
2 Mr. Menges lacks standing?

3 MS. TOKERUD: Well, we understand that he now lives
4 in the state of Montana. As the plaintiff argued in one of
5 their briefs, standing is based on the facts set forth in the
6 complaint. There has been no amended complaint. We do
7 understand he lives here now.

8 THE COURT: Well, that's a stipulated fact.

9 MS. TOKERUD: That's correct.

10 THE COURT: Paragraph 20, "In March 2021, Menges
11 established residency in Butte, Montana."

12 Paragraph 21, "He currently resides in Butte and his
13 address on the Registry is a Butte address."

14 So he's, sounds like he's in Butte, and he is
15 currently registered pursuant to Montana's statutory scheme.

16 MS. TOKERUD: (Nodded head affirmatively.)

17 THE COURT: Correct?

18 MS. TOKERUD: That's correct.

19 THE COURT: Okay.

20 MS. TOKERUD: And I believe that some of that is
21 also set forth in paragraph 18, the status of his event
22 history.

23 THE COURT: Yes. Right.

24 So how is, how is having your -- having the state
25 publicly disseminate your name and address on the basis that

1 you're a sex offender under Montana law not a concrete injury
2 traceable to the actions of the state?

3 MS. TOKERUD: The state's position is that it is
4 maintaining the requirements that are imposed by -- in another
5 state, by another state, so it's not a material change. Even
6 assuming that there is injury, you know, we clearly think that
7 the claims fail for other reasons.

8 THE COURT: Okay.

9 MS. TOKERUD: So assuming that the plaintiff
10 overcomes some of these procedural issues that we've just
11 discussed and gets to the merits, we believe that the claims
12 fail. Each claim, as you and I discussed earlier, is based,
13 from our perspective, on the incorrect legal theory that
14 Montana requires registration based on the facts of the
15 underlying conviction. That's not right as a matter of law.

16 Under the plain language of the statute, Montana
17 requires registration because another state does, and the
18 facts are irrelevant. The facts would be relevant if the
19 first prong of the statute about an equal offense were
20 triggered, but that's not applied to the plaintiff, nor has it
21 been challenged here.

22 The plaintiff's first claim is the substantive due
23 process claim which prevents the plaintiff from the arbitrary
24 deprivation of liberty by the government. Even assuming that
25 there's such a deprivation here, it does not give rise to a

1 federal constitutional violation.

2 To the extent that the plaintiff's substantive due
3 process claim rests on the alleged violation of *Lawrence v.*
4 *Texas*, he again is, in our mind, improperly asking the Court
5 to look at the facts of the underlying conviction.

6 Montana takes no position on the constitutionality
7 of Idaho's statute under *Lawrence*. That's being litigated in
8 Idaho right now, based on our understanding, which is the
9 correct forum. Idaho is not a party here. I understand they
10 are listening in today, but they haven't defended their law in
11 this court, and we don't believe that, you know, this Court
12 should reach that law, nor need you to reach that because, as
13 a matter of law, Montana does not look to the underlying
14 conviction or statute when requiring registration here.

15 Giving full faith and credit to another state's
16 determination that someone is required to register as a sex
17 offender is not arbitrary, capricious, or conscious, shocking
18 behavior.

19 As to the equal protection claim, Montana's
20 registration law is neutral on its face. The plaintiff has
21 not offered any fact that demonstrates discriminatory intent.
22 Montana -- excuse me. The plaintiff is treated the same as
23 any other person required to register in another state who
24 then moves to Montana to the degree that this treatment
25 creates any type of class that's not a protected class;

1 whereas, here, a state action does not burden a fundamental
2 right or target a suspect class, the classification must be
3 upheld if there is any reasonably conceivable state of facts
4 that could provide a rational basis for the classification.

5 Here, the plaintiff has acknowledged that the state
6 does have legitimate interests in the law in general, and we
7 believe the state also has an interest in the laws applied to
8 Menges. If the law does not apply to the plaintiff and the
9 state has to make a determination individually about whether
10 an underlying conviction requires registration, then the 2005
11 amendments to Montana's law would essentially be meaningless.
12 The legislature has an interest in the rule being one of
13 universal application.

14 And, lastly, the plaintiff raises a privacy claim,
15 arguing that under Montana law -- excuse me, under the Montana
16 Constitution, his right to privacy is violated because
17 consensual, private, same-gender, between-adult sexual conduct
18 is protected. Again, that goes to the underlying facts, and
19 we don't believe you need to reach that.

20 On the facts before this Court, though, it is
21 unclear whether the conduct at issue would be protected
22 behavior. For one thing, Montana's position is that it's not
23 clear that the parties would have been legally capable of
24 giving consent under the facts presented.

25 Again, we don't think you need to reach that issue,

1 though, and wade into the facts underlying the conviction
2 because the registration requirement does not hinge on the
3 fact that the plaintiff had gay sex, as he claims. It again
4 hinges on the fact that Idaho requires registration.

5 Nor are there separate privacy concerns at issue.
6 As a civil regulatory scheme, protected information is not
7 disseminated to the public. The information that is
8 disseminated, including the fact of the conviction, are
9 already in the public domain. And, moreover, the law is
10 neutral and is based on legitimate and substantial state
11 interests, as argued in the briefing.

12 Because we believe that the plaintiff has failed to
13 prove his constitutional challenge, the state would request
14 that the Court deny the permanent injunction and find that the
15 law does not unconstitutionally burden the plaintiff's rights
16 and that the state interests outweigh the burden.

17 We've also filed the motion to stay pending the
18 outcome in Idaho to see how that would play into this court.
19 As counsel indicated, argument in that is set for April 7 and
20 is forthcoming.

21 We've also filed the motion to dismiss the claims
22 alleging that the claims are *Heck*-barred and that he has
23 failed to state a claim for relief.

24 So I'm happy to answer any of your questions.

25 THE COURT: Understood.

1 MS. TOKERUD: Okay.

2 THE COURT: All right. Thank you, Ms. Tokerud.

3 MS. TOKERUD: Thank you, Your Honor.

4 THE COURT: Mr. Strugar, you may rebut briefly.

5 MR. STRUGAR: I will be brief, Your Honor.

6 As to the issue of the Idaho case, no matter --
7 again, this is a point I already made in my initial argument,
8 but no matter what Idaho does, the text of the Idaho law will
9 still require registration. It may enjoin Idaho officials
10 from enforcing it, but we're not going to change the law.
11 That's not what federal courts do. The recent case of *Barr v.*
12 *American Association of Political Consultants* talks a good bit
13 about this, about what happens when either -- you know, even
14 after successfully changing -- successfully facially
15 challenging the law, it still doesn't rewrite it. It enjoins
16 officials. It sort of relies on vertical and *stare decisis* to
17 make sure that that ruling is upheld elsewhere, but it doesn't
18 change it.

19 And so under Idaho law he will still be required to
20 register, and under Montana law he will still be required to
21 register. So we're simply asking that the state -- that the
22 Court here enjoin officials that it has jurisdiction over,
23 over a law in this state, not over anything that's gonna
24 happen in Idaho.

25 The state, within its briefing and its arguments,

1 continues to say that we are challenging the facts of his
2 conviction. That's not exactly true. You know, our initial
3 position is that any pre-Lawrence conviction should be
4 protected from registration today, no matter what the
5 underlying facts are, because it's been based on
6 since-invalidated statutes.

7 But sort of as an in-the-alternative argument, we do
8 argue that even if you have to look at the facts of
9 Mr. Menges's convictions, the arguments still hold up that
10 it's still protected conduct.

11 A quick point about the standing being assessed
12 based on the facts pled in the complaint, that is, of course,
13 the rule. But Federal Rule of Civil Procedure 15(b)(2) says
14 if an issue is not raised in the pleadings and it's tried by
15 the parties, it's treated as if it's pled. Here, we have
16 stipulated facts that he lives in Butte, and the Court has
17 seen his own registration page. If an amended complaint is
18 needed, we're happy to file an amended complaint.

19 The argument that he has other avenues of relief,
20 again, his ability to file a postconviction motion in Idaho
21 expired in 1995. You know, we believe the state is trying to
22 serve -- again, pass the buck to Idaho to avoid taking
23 responsibility for Montana officials' own actions.

24 And when the state says that, you know, "Oh, we're
25 just enforcing Idaho's laws," without regard to the

1 constitutionality or the facts of the underlying conviction,
2 again, it's an admission by the state that they're not taking
3 some pretty minor action to attempt that its officials are
4 acting within the law.

5 We don't know how many other people are in
6 Mr. Menges's situation. We've issued discovery, but we
7 probably won't get answers. It sounds like this case might be
8 resolved before then. But there's only three states left that
9 still require registration for pre-*Lawrence* sodomy
10 convictions: It's Idaho, Mississippi, and South Carolina. We
11 don't believe that there would be much of a requirement in the
12 state, even if we got a declaration at all. Pre-*Lawrence*
13 sodomy convictions are protected from registration by the
14 substantive Due Process Clause. We don't think it would
15 affect more than a handful of people, although admittedly we
16 don't know.

17 Finally, the state, the state makes a point about
18 it's in question about the ability of the other -- the
19 16-year-olds to consent. I'd just point out Montana's age of
20 consent is 16. Montana just considers 16-year-olds capable of
21 consent, straight up.

22 So just to close, Your Honor, you know, *Lawrence*
23 held, quote, "When homosexual conduct is made criminal by the
24 law of the State, that declaration in and of itself is an
25 invitation to subject homosexual persons to discrimination

1 both in the public and in the private spheres," end quote.

2 Montana is forcing Mr. Menges to register for having
3 gay sex in 1993. It's a small part of a dark history against
4 gays and lesbians in this country. It's a history that's
5 barely a history, where people who are alive today can
6 remember where people weren't just criminalized but
7 institutionalized, sterilized, and lobotomized for loving who
8 they loved; where, in my own memory, a plague killed hundreds
9 of thousands of gay men in this country while the federal
10 government did little to stop it, and millions of Americans
11 cheered it on because of who the victims were; and where, four
12 years after Randall Menges was convicted in the state directly
13 to Montana's west, in the state directly to Montana's south
14 three young men tied another young man to a barbed-wire fence
15 and beat him within an inch of his life, to which he
16 eventually succumbed to those injuries, just because he was
17 gay.

18 I'm not asking the Court to fix any of these old
19 wrongs. This Court can't do that, and we're not asking it to.
20 But it can fix this one, and we are asking the Court to fix
21 this one.

22 We ask the Court to deny the motion to dismiss, deny
23 the motion to stay, and grant Mr. Menges's injunctive relief
24 against his registration requirement.

25 Thank you.

1 THE COURT: All right. Thank you.

2 Well, the matter is fully submitted. I want to
3 thank counsel for the arguments this afternoon. They were
4 very good and very helpful, and I will endeavor to get a
5 ruling out as quickly as I can.

6 So take care, everybody. We're in recess. Thank
7 you.

8 MR. STRUGAR: Thank you, Your Honor.

9 MS. TOKERUD: Thank you, Your Honor.

10 (Proceedings were concluded at 14:44:25.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 REPORTER'S CERTIFICATE

2 I, JoAnn Jett Corson, a Registered Diplomate
3 Reporter and Certified Realtime Reporter, certify that the
4 foregoing transcript is a true and correct record of the
5 proceedings given at the time and place hereinbefore
6 mentioned; that the proceedings were reported by me in machine
7 shorthand and thereafter reduced to typewriting using
8 computer-assisted transcription; that after being reduced to
9 typewriting, a certified copy of this transcript will be filed
10 electronically with the Court.

11 I further certify that I am not attorney for, nor
12 employed by, nor related to any of the parties or attorneys to
13 this action, nor financially interested in this action.

14 IN WITNESS WHEREOF, I have set my hand at Missoula,
15 Montana this 11th day of June, 2021.

16

17 /s/ JoAnn Jett Corson

18 _____
19 JoAnn Jett Corson
20 United States Court Reporter
21
22
23
24
25